

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MERCEDES MARKER,) Case No.: 09-CV-05956-RMW
Plaintiff,) ORDER DENYING MOTION FOR
v.) PARTIAL SUMMARY JUDGMENT
CITY OF SAN JOSE and SON VU,
Defendants.)

Plaintiff Mercedes Marker moves for partial summary judgment on claims for civil rights violations, false imprisonment and battery arising out of an interaction with officers from the San Jose City Police Department. For the following reasons, the court denies the motion.

I. BACKGROUND

On the evening of November 13, 2008, Mercedes Marker (“plaintiff”) accompanied non-party William Hampsmire to the public sidewalk near South 2nd Street and Paseo de San Antonio in San Jose, California. Dkt. No. 37 (Marker Decl. ¶ 2). According to plaintiff, she used a video camera to film Mr. Hampsmire while he “preached the gospel of Jesus Christ” to a group of onlookers. Defendant Officer Son Vu (“defendant”) and his colleague, non-party Officer Jose Hisquierdo, were called to the scene because of complaints related to Mr. Hampsmire’s conduct. Dkt. No. 40 (Vu Decl. ¶ 3). Defendants claim Mr. Hampsmire was loudly spewing racial epithets and “effectively inciting a riot.” (Vu Decl. ¶ 4-5). As a result, Officer Hisquierdo began the

1 process of collecting Mr. Hampshire's identifying information for the purpose of arresting him. (Vu
 2 Decl. ¶ 7). Plaintiff continued to film Mr. Hampsmire as he interacted with the officers. Plaintiff
 3 also asked the officers "What did he do wrong?" After not receiving a reply, plaintiff repeated the
 4 question. (Marker Decl. ¶ 15).

5 The parties dispute what happened next. According to defendant, "as Officer Hisquierdo
 6 was conducting the arrest of Mr. Hampsmire, plaintiff ... imposed herself to within an arm's length
 7 of Officer Hisquierdo and began distracting him with questions and video recording." (Vu Decl. ¶
 8 7). Defendant claims that he felt concern for officer safety "due to plaintiff's physical proximity to
 9 Officer Hisquierdo, her intrusion into the arrest process, and her efforts to distract Officer
 10 Hisquierdo."¹ *Id.* Defendant states that he expressly asked plaintiff to back up. When plaintiff
 11 "did not appear to immediately respond," defendant said "Let him do his job" and proceeded to
 12 push plaintiff's camera away with his right hand, while using his left hand to guide plaintiff's
 13 shoulder and move her a few feet away from the scene of arrest. *Id.* Defendant denies ever hearing
 14 plaintiff complain of pain during or after the physical contact. (Vu Decl. ¶ 8).

15 Plaintiff describes the events differently. She acknowledges that she was near the officers
 16 at the time of Mr. Hampsmire's arrest, but claims that she "moved back" when the interaction
 17 began. (Marker Decl. ¶ 16). In her declaration, plaintiff says, "[defendant] took his hand and put it
 18 over my right hand which was holding the camcorder. The camcorder strap was around my wrist.
 19 [Defendant] then started twisting my hand and pushing me, causing me to walk." (Marker Decl. ¶
 20 17). Plaintiff claims that she did not hear defendant say "Let him do his job" until just after he
 21 made contact with her. (Marker Decl. ¶ 18). She then asserts that defendant caused her hand and

23 ¹ Plaintiff argues that the statement in defendant's declaration indicating that he was
 24 concerned for officer safety is contradicted by his deposition testimony, and that the declaration
 25 should therefore be disregarded. A party cannot create an issue of fact by submitting a "sham
 26 affidavit" contradicting prior testimony. *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th
 27 Cir. 2009). However, the court finds that defendant's deposition and declaration are sufficiently
 28 consistent on this point to preclude application of the "sham affidavit" rule. *See id.* at 998-99
 ("[T]he inconsistency between a party's deposition testimony and subsequent affidavit must be
 clear and unambiguous to justify striking the affidavit."); Dkt. No. 42 (Vu Depo. at 85-86) ("Q: At
 this point in the encounter when you were there, were there any persons present who gave you
 cause for concern about officer safety? A: Yes. At that – at this point, yes. Q: Who present was
 giving you a concern about officer safety? A: The—Ms. Marker with the video camera.").

1 the camera to swing in a 180 degree circle. (Marker Decl. ¶ 19). Plaintiff also alleges that while
2 the camera twisted she said, “Oh-no!”, “You’re hurting me” and “Ow-you’re hurting my arm!”
3 (Marker Decl. ¶ 21). Plaintiff estimates that defendant moved her approximately five feet away
4 from the scene of the arrest. (Marker Decl. ¶ 24).

5 Following the incident, plaintiff complained to a friend of pain in her hand and wrist area.
6 She went to Santa Clara Valley Medical Center the next day. (Marker Decl. ¶ 26). She claims
7 that she continues to have difficulty with many of her daily activities, but has not provided any
8 evidence of treatment of her alleged injury.

9 II. ANALYSIS

10 1. First Amendment Claim

11 Plaintiff asserts that defendant violated her First Amendment rights when he twisted her
12 camera while she was filming Mr. Hampsmire’s arrest. In order to demonstrate a First Amendment
13 violation, a plaintiff must provide evidence showing that “by his actions [the defendant] deterred or
14 chilled [the plaintiff’s] political speech and such deterrence was a substantial or motivating factor
15 in [the defendant’s] conduct.” *Sloman v. Tadlock*, 21 F.3d 1462, 1469 (9th Cir. 1994). The First
16 Amendment forbids government officials from retaliating against individuals for “speaking out.”
17 See *Hartman v. Moore*, 547 U.S. 250, 256 (2006); see also *Gibson v. United States*, 781 F.2d 1334,
18 1338 (9th Cir. 1986). To recover for such retaliation, a plaintiff must prove: (1) she engaged in
19 constitutionally protected activity; (2) as a result, she was subjected to adverse action by the
20 defendant that would chill a person of ordinary firmness from continuing to engage in the protected
21 activity; and (3) there was a substantial causal relationship between the constitutionally protected
22 activity and the adverse action. See *Pinard v. Clatskanie School Dist.*, 467 F.3d 755, 770 (9th Cir.
23 2006).

24 It has been recognized that the videotaping of public officials is an exercise of First
25 Amendment liberties. See *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (finding that filming or
26 videotaping of government officials engaged in their duties in a public place, including police
27 officers performing an arrest, is protected by the First Amendment); cf. *Gentile v. State Bar of*
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1 Nev., 501 U.S. 1030, 1035-36 (1991) (recognizing a core First Amendment interest in “the
2 dissemination of information relating to alleged governmental misconduct”). However, there are
3 issues of material fact as to whether plaintiff’s speech was chilled and if there was a substantial
4 causal relationship between the filming of the arrest and defendant’s action. Plaintiff was able to
5 continue filming the police for thirteen minutes after her interaction with defendant, suggesting that
6 her rights were not “chilled” by his conduct. Further, while plaintiff claims it can be “inferred”
7 that her speech was a “substantial or motivating factor” in defendant’s decision to move her from
8 the scene, defendant maintains that his action was motivated by plaintiff’s interference with a valid
9 arrest. Plaintiff cites no case finding a First Amendment right to interfere with a police arrest.
10 *Compare Glik*, 655 F.3d at 84 (“Glik filmed [the officers] from a comfortable remove...neither
11 spoke to nor molested them in any way.”). “Since credibility determinations, the weighing of the
12 evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a
13 judge, whether he is ruling on a motion for summary judgment.... The evidence of the non-movant
14 is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty*
15 *Lobby, Inc.*, 477 U.S. 242, 255 (1986). As a reasonable juror could find that defendant did not
16 intentionally infringe plaintiff’s right to free speech, or that her rights were not chilled at all, the
17 court denies plaintiff’s motion as to her First Amendment claim.

18 **2. False Imprisonment Claim**

19 Plaintiff next claims that defendant falsely imprisoned her. Under California law, the
20 elements of a claim for false imprisonment are: “(1) the nonconsensual, intentional confinement of
21 a person, (2) without lawful privilege, and (3) for an appreciable period of time, however brief.”
22 *Young v. County of Los Angeles*, 655 F.3d 1156, 1169 (9th Cir. 2011).

23 First, there is an issue of fact as to whether plaintiff was “confined.” In order to constitute
24 false imprisonment, there must be *direct restraint* of the person for some appreciable length of
25 time, however short, compelling the person to stay or go somewhere against his or her will. *See*
26 *Vandiveer v. Charters*, 110 Cal. App. 347 (Cal. Ct. App. 1930); *see also* 5 Witkin, Summary 10th
27 (2005) Torts, § 427. Here, plaintiff asserts that she was confined when defendant “twist[ed her]

1 hand”, “push[ed her]”, and “caus[ed her] to walk.” (Marker Decl. ¶ 17). Such conduct, if proved,
2 could constitute confinement under California law. *See Hanna v. Raphael Weill & Co.*, 90 Cal.
3 App. 2d 461 (Cal. Ct. App. 1949) (plaintiff had a case for false imprisonment when she was
4 grabbed by her arm and escorted back to the store). However, a jury could also accept defendant’s
5 version of the facts, in which he merely used “his right hand to make contact with plaintiff’s elbow
6 or shoulder to guide her a few feet away...” Dkt. No. 39 at 3. Whether such a limited “restraint”
7 meets the definition of confinement is an issue of fact. *See Hanna*, 90 Cal. App. 2d at 463 (holding
8 that “appellant proved a prima facie case of false imprisonment which *should have gone to the*
9 *jury*”) (emphasis added).

10 In addition, there is a factual issue as to whether the defendant’s action was privileged.
11 While an officer cannot claim privilege as a defense to a claim of false imprisonment if he *abuses*
12 his authority, *see Ware v. Dunn*, 80 Cal. App. 2d 936, 944 (Cal. Ct. App. 1947), “the calculus of
13 reasonableness must embody allowance for the fact that police officers are often forced to make
14 split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”
15 *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Further, California law expressly allows police
16 officers to take measures to keep people from interfering with the performance of their job. *See*
17 Cal. Pen. Code § 148 (making it a crime to willfully delay or obstruct an officer in the discharge of
18 his or her official duties). As a jury could find that defendant rationally understood plaintiff to be
19 interfering with a lawful arrest and that he was acting within the scope of his authority, plaintiff is
20 not entitled to summary judgment as to the claim for false imprisonment.

21 **3. Fourth Amendment Claim**

22 Plaintiff next claims that defendant used unnecessary force in “seizing” her, violating her
23 Fourth Amendment rights. A claim against law enforcement officers for excessive force is
24 analyzed under the Fourth Amendment’s “objective reasonableness” standard. *See Graham*, 490
25 U.S. at 388. “Determining whether the force used to effect a particular seizure is reasonable under
26 the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the
27 individual’s Fourth Amendment interests against the countervailing governmental interests at
28

1 stake.” *Id.* at 396. “The reasonableness of a particular use of force must be judged from the
2 perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.*
3 (*citing Terry v. Ohio*, 392 U.S. 1, 20–22 (1968)).

4 In this case, genuine issues of material fact exist regarding whether the defendant’s use of
5 force was objectively reasonable. The reasonableness of an officer’s conduct is generally “a
6 question of fact best resolved by a jury,” *Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir.
7 2003); only in the absence of material disputes is it “a pure question of law.” *Scott v. Harris*, 550
8 U.S. 372, 381 (2007). The parties here disagree about the amount of force defendant applied when
9 he approached plaintiff. Taking defendant’s statements as true, a reasonable jury could find that
10 defendant’s contact with plaintiff was reasonable in light of his belief that she was interfering with
11 a lawful arrest. The court thus denies plaintiff’s motion for summary judgment on her Fourth
12 Amendment claim.

13 **4. Battery Claim**

14 Plaintiff last includes a claim for battery under California law. It is clear that a battery
15 claim against a police officer requires that unreasonable force be established. *Edson v. City of*
16 *Anaheim*, 63 Cal. App. 4th 1269, 1272 (Cal. Ct. App. 1998); *Finley v. City of Oakland*, 2006 WL
17 269950, *14 (N.D. Cal. 2006). The court’s findings with respect to the Fourth Amendment claim
18 largely mandate that plaintiff’s request for summary adjudication as to the battery claim fails as
19 well. *See Nelson v. City of Davis*, 709 F. Supp. 2d 978, 992 (E.D. Cal. 2010) (“Because the same
20 standards apply to both state law...battery and Section 1983 claims premised on constitutionally
21 prohibited excessive force, the fact that...claims under the Fourth Amendment survive summary
22 judgment also mandates that the...battery claims similarly survive.”). Although plaintiff claims
23 that it is defendant’s burden to prove that his use of force was reasonable, the record here clearly
24 contains enough evidence to raise a factual issue concerning how much force was used. Thus,
25 regardless of who bears the burden of proof, summary judgment is not appropriate.

26 **III. ORDER**

27 For the foregoing reasons, the court denies plaintiff’s motion for partial summary judgment.

United States District Court
For the Northern District of California

1 DATED: July 31, 2012

Ronald M. Whyte
RONALD M. WHYTE
United States District Judge